



July 5, 2022

Department of Financial Protection and Innovation
Attn: Sandra Navarro
300 S. Spring Street, Suite 15513
Los Angeles, CA 90013

Re: PRO 03-21 — Proposed Rulemaking Under the CCFPL: Consumer Complaints

Dear Ms. Navarro:

On behalf of the American Financial Services Association (“AFSA”)¹ and California Financial Services Association (“CFSA”), thank you for the opportunity to provide comments on the Department of Financial Protection and Innovation’s (“DFPI” or “Department”) May 20 proposed rulemaking (PRO 03-21) under the California Consumer Financial Protection Law (“CCFPL”). AFSA and CFSA represent financial institutions of all sizes across many of the industries DFPI oversees. We believe clear rules that take into account existing laws benefit consumers and financial institutions alike, and we appreciate the Department’s consideration of our previous comments related to earlier drafts of this rulemaking. As with earlier drafts, the proposed rules would be incredibly burdensome and require significant operational changes with little added consumer benefit. Many of the rules’ requirements would likely increase costs for consumers due to the necessary expense required to implement the significant changes and the increased costs of doing business in the state.

The Unreasonable and Unduly Burdensome Proposed Complaint Process

The mandated creation of a DFPI-specific complaint and response process is unreasonable and unduly burdensome on entities already subject to rigorous complaint and response systems maintained by federal agencies, state attorneys general and accreditation entities. Complaints are a valuable tool for improving business, identifying systemic issues, and detecting potential violations of applicable consumer protection laws, and monitoring consumer complaints is a core pillar of an effective compliance management system. Covered persons already have robust processes in place to receive and process consumer complaints. These processes are integrated into existing phone and mail systems—systems with which consumers are already familiar—so a complaint process specific to a single state would require significant changes to numerous company systems for consumers who already know how to contact a company.

Many of the requirements in the rules fail to take into account existing processes, and implementation would be burdensome for large and small businesses alike. We reiterate our

¹ Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

request from previous comments that the rules provide more flexibility for covered persons to operate within their existing complaint processes appropriate to the size and complexity of their business, which will streamline implementation and speed up response times for consumers across company segments. For instance, several provisions of Section 1072 outline individuals at a covered entity who must take part in the complaint process, but review by a certain individual may not be feasible or appropriate depending on the company's structure. We also request added flexibility in the event of a frivolous complaint, instances where the consumer is dissatisfied with a response but continues to complain about the same issue, or where the complaint has no basis or makes no sense.

In lieu of implementing rules with very detailed requirements for complaint handling, the Department could instead require covered persons to develop and maintain complaint handling procedures and a complaint management program. The Department could examine covered entities' programs as appropriate. This would meet the Department's objective to promulgate rules with respect to covered persons having policies and procedures to handle consumer complaints. These rules could include high-level requirements (e.g., respond to complaints within sixty days, log and track complaints, and maintain records for a certain period of time), but leave the details and minutia to the covered entities. This would reduce the burden on covered persons, many of whom already have established complaint processes in place.

There is no benefit to consumers if covered persons are required to create specific complaint processes for California consumers alone. Covered persons already have processes in place to address complaints to comply with state and federal requirements and regulatory expectations, and because the entities want to provide good customer service. Requiring covered persons to put into place very specific procedures and processes to comply with one state's complaint handling rules will likely add no value to consumers and will only serve to increase the cost of doing business and negatively impact consumers through increased prices.

At the very least, to the extent the DFPI implements its own, agency specific complaint and response process, the DFPI's highly detailed and specific formats for complaint forms, disclosures to the consumer, and referral to the DFPI counsel in favor of the DFPI creating its own model complaint form that will be made available to consumers at one, central location—namely, the DFPI website, rather than having all regulated entities provide the proscribed content of what should be found on a DFPI complaint form, and then maintained on their respective websites or at their physical locations. A Department form and maintenance of a portal, similar to that provided by the CFPB, would relieve some of the compliance burden for entities implementing the rules, while ensuring there is an option for consumers that meets the Department's standards.

Burdensome Process and Response Times

As with earlier drafts, the required response times are one of the most burdensome aspects of these rules. We reiterate our previous comments that, across the board, the response/processing times required by the rules are too short, overly burdensome and not feasible in practice. Importantly, the process to review and respond to a complaint takes time, as a company must investigate, refer it to the relevant company segment, properly identify the consumer if

incomplete information was provided and ensure a thorough understanding of the issue before responding. A short time frame prioritizes a response over proper investigation and appropriate resolution.

We reiterate our previous request that all timeframes be changed to business days rather than calendar days. Such a change would better reflect operations and the respect the schedules of the employees responsible for handling complaints. With some short requirements in the rules, a holiday weekend could encompass nearly the entire timeframe allowed by the rules without a single business day passing. Calendar day timeframes can be particularly challenging in cases where postal mail is used, given the many well-documented delays. Additionally, the variances in the proposed response times is unclear, specifically in regard to complaints received at physical locations accessible to consumers as there is no specific response timeframe outlined in the proposed rules regarding complaints received at physical locations.

Sometimes complaints require escalated review or multiple layers of review, and seven (7), or even fifteen (15) days can be too tight of a time frame to respond and provide a final resolution. The CFPB recognizes this and allows for 30 days to respond to complaints in its own portal. For this reason, we also recommend extending the other various timeframes within the rules so as to provide covered persons with at least thirty (30) days to investigate and respond to verified complaints with an opportunity to request a thirty (30) day extension if needed. The rules currently set out a fifteen (15) day limit with an opportunity for an additional forty-five (45) day extension. Our proposed timeline would maintain the sixty (60) day maximum while providing some additional time for companies to investigate and respond. This timeline would satisfy business needs regardless of type of business or product, while still providing consumers with a response to their concerns.

Applicability and Exemptions

The requirements of the rulemaking are aimed at “covered persons.” However, that term is not defined in the draft rule. Further, applicability of the rule hinges on whether a complaint relates to a “financial product or service.” However, that term is also left undefined by the rule.

Since the rulemaking derives its authority from Cal. Fin. Code § 90008 within the CCFPL, the rule must be limited by the definitions and exemptions from the CCFPL. In particular, Cal. Fin. Code §§ 90005(f) (definition of “covered person”), 90005(k) (definition of “financial product or service”), 90002 (exemptions for various DFPI licensees, banks and bank affiliates, and licensees of other California regulators), 90008(c) (exemption for consumer reporting agencies), and 90008(d)(3) (same) constrain DFPI’s authority to impose new requirements by rule. Yet the rule contains exemptions at §1070 that only align with the CCFPL with respect to consumer reporting agencies. The rule should clarify that entities exempted from Cal. Fin. Code § 90008 are also exempted the rule’s requirements.

There is also a lack of clarity as to how this proposed regulation applies to parties and transactions regulated under the DFPI-administered Debt Collection Licensing Act (“DCLA”). The CCFPL contains myriad exemptions at Section 90002, including an exemption for otherwise

covered persons who are licensed by a different state agency (Cal. Fin. Code § 90002(a)); and for persons acting under the authority of the licenses enumerated at § 90002(b).

We respectfully request that entities with pending licenses under the DCLA be added to the list of exemptions under Cal Fin. Code § 90002(b). The existing comprehensive list which does not currently include the DCLA makes it clear that the CCFPL is not intended to apply to a person or employee to the extent that person is acting under the authority of the license issued by the DFPI. There is no policy reason that a person operating under a collections license under the DCLA should be subject to the CCFPL, and we respectfully request the Department extend the exemption list to cover such licensees.

Because this rule lays out numerous affirmative requirements and detailed public reporting, it is vital that DFPI define precisely who the requirements apply to. That is customary for substantive rulemaking by regulatory agencies. As it stands, DFPI's intent for applicability of this rule is simply unclear and must be clarified.

DFPI should be mindful that the CCFPL definition of "financial product or service" is extremely broad and implicates various businesses that have never been licensees of DFPI and may not be covered in other substantive financial regulations. Those businesses need fair notice that they are subject to this new substantive regulation.

Section 1071: Definitions

We continue to have concerns with the broad definition of "inquiry," which could still require extensive tracking and recordkeeping of mundane requests, such as those for mailing addresses or operational hours of branch offices. Although our recommendation is to strike the entirety of Section 1073—as we outline below—which would make this definition unnecessary, if Section 1073 remains, then we request that the definition of "inquiry" be narrowed to include only those questions materially affecting a consumer's understanding of a financial product or service.

Section 1072: Complaint Processes and Procedures

Part (a)

Part (a)(2) limits the identifying information a company may request of a complainant. However, if a company is allowed only to ask for the complainant's name, phone number, address, and email, it may not be able to tell two people with the same name (father-son, for instance) apart when they live at the same address and have the same landline telephone number, particularly if the customer did not provide an email when account was created. Without being able to identify a complainant by another identifier, account number or social security number for instance, it's possible to easily mistake a Sr for a Jr, as an example.

Part (a)(3) would require disclosure of the complaint procedures in all written communications with the consumer. While we appreciate the Department's clarification from previous drafts that this would not apply to SMS messages, this requirement is still overly broad. First, the Department should recognize that adding such a disclosure to all written communications would

entail a major retooling for most financial services businesses. Second, the Department should recognize that many companies do business on a nationwide basis and have created letters and emails that serve a nationwide audience. The Department is effectively forcing businesses to either deliver the prescribed notice repeatedly to non-California consumers, to build special California versions of all communications, or to build (or buy) technology to deliver the disclosure dynamically. Furthermore, companies send many communications, including privacy notices required by the federal Gramm Leach Bliley Act, and disclosure of the complaint procedures would not be appropriate in such communications. Much of a company's written correspondence to customers might be confusing with the complaint disclosure; would including this disclosure on a written communication celebrating Pride or Black History Month, for example, really serve the spirit of the proposal? Accordingly, we recommend disclosure of the complaint procedure only be required on the website; in the consumer agreement for the financial product or service; the initial written communication with the consumer or first periodic written statement; and in retail locations.

Part (a)(4) requires a covered person to prominently display a link to the complaint form at or near the top of the website main page. Companies often have multiple lines of business that link from the same home page. Many of these lines of business will not be subject to the requirements in the rule. By requiring companies to include disclosures at the top of the home page, the DFPI risks confusing consumers about what rights they may have while obfuscating other information on the home page that would be relevant to consumers. Companies operate on a national basis, serving consumers who are not California residents as well as California consumers. A requirement to place California specific contact information on the home page could cause confusion for customers who are not California residents, delaying responses and handling of complaints. While companies are required to provide certain state specific disclosures, there is flexibility on the location of links, where further details can be provided that are specific to the state, and the burden of this requirement would far exceed others.

Part (a)(5) would require a specific option to leave a voicemail be available to consumers when a live representative is unavailable to take a complaint and require response within 24 hours. This requirement is not feasible and should be removed from the rules. Call centers publish hours of operations on billing statements, websites, response letters, etc. and maintain electronic secure messaging platforms for submissions at all times, even outside of normal business hours. Consumers have many options for submitting complaints and there is little benefit to a dedicated voicemail process. Further, the 24-hour response timeframe cannot feasibly be implemented, particularly given that all voicemails would be left outside of normal business hours. If a consumer leaves a voicemail immediately after business hours over a holiday closure, there is no way this requirement could be met without demanding an employee give up their own holiday time to respond to complaints. This requirement unfairly burdens employees of covered entities without any added consumer benefit given that no complaint will be resolved in such a short time frame. Further, the term "unavailable" is vague. Would a hold time of five minutes during business hours require the option to leave a voicemail?

Part (a)(6) requires that the complaint process be available in certain languages other than English. While there are requirements to provide a contract in the language when applicable, there is no statutory requirement to provide servicing in these languages. Importantly, the

Department could easily resolve this issue by providing its own complaint form for covered entities to use and by making that form available in the languages outlined.

Part (b)

Part (b) outlines a process for receipt and acknowledgement of complaints. This would be an unnecessary and burdensome process. The majority of consumer complaints are made by phone, during which the covered person advises the complainant that they are logging a complaint. Any additional acknowledgement does not add value and would only take time away from covered persons working to resolve the complaints. In addition, as with other sections of the rules, the response timeframes are too short to be feasible. Further, the prescriptive method of the acknowledgement is neither necessary nor customer friendly. We believe the most appropriate option would be additional flexibility that allows the covered person to make the acknowledgment by e-mail, postal mail, *or* telephone, at the entity's discretion, regardless of how the complaint was received. For instance, a representative who accepts a complaint by phone may not have immediate access to the unique complaint tracking number at the time the consumer makes the complaint and would need to call back the consumer to acknowledge and provide it over the phone.

With regard to the requirements for email and electronic submissions in (b)(1), the one (1) day acknowledgement timeframe may not be feasible in many cases. While messages submitted through a secure portal or sent to an email address specifically for complaints may trigger an automatic acknowledgement, emails sent to other company officials outside of the normal complaint process may take longer than one day to move into the proper complaint channels. For all of the requirements of part (b), we request clarity that the timeframes only apply to complaints submitted through the complaint process to which the covered entity has directed the consumer.

Additionally, the detailed process of acknowledging and then providing a notice of resolution for every complaint in a short timeframe would not always make sense in practice, despite the provision in (b)(4). A written acknowledgement for a complaint that is received and resolved over the phone would not be appropriate and would just be a compliance burden. Additionally, given frequent postal service delays, a written acknowledgement that arrives after a complaint has been resolved may actually confuse the consumer and lead them to believe the complaint is still open. The prescribed requirements also don't allow for flexibility in the event a consumer makes the same complaint through multiple methods. In such instances, the covered entity must not be required to separately acknowledge such communications.

Part (c)

The procedures outlined in section (c)(1) requiring recording of employees responsible for deciding whether to investigate the complaint and recording the names of individuals responsible for the source of the complaint are concerning. A decision not to investigate may be made by a team of individuals, rather than a single person. We believe it would be better to document why a decision was made, rather than who made it. Additionally, we believe there should be more flexibility regarding who conducts the review to allow for review by employees with knowledge

of the service and operations, as opposed to the people who are responsible. This would allow an independent employee of the covered person to double check the work of the people providing the service to ensure those responsible for the service and operations acted appropriately. While investigations may uncover wrongdoing by individuals and need to be addressed accordingly, including potential disciplinary action, listing individuals for lower-level complaints is burdensome and intrusive. It also requires covered persons to point fingers instead of focusing on resolving the issue. For example, if it's a system error or an agent mistakenly didn't do an action, spending time on who to name is less time spent on resolving the issue and moving forward.

We also have significant concerns with part (c)(2), which requires enforcing complaint processes against third-party vendors. While we understand the purpose of this section, in practice, it will require a major restructuring and renegotiation of all contracts with vendors to add the new enforcement provisions and cannot feasibly be implemented in time for compliance with the rules. Further, if a third-party vendor fails to respond to a complaint in a timely manner, holding a covered entity responsible for this violation would not make sense when consumers could separately file complaints directly with the vendor involved and the vendor could conduct its own investigation. Financial institutions have robust vendor management programs to address any issues identified in complaints, but these processes are specific to each company, and requiring compliance with this section would be overly burdensome and unreasonable.

Regarding part (c)(3), requiring an officer to review all complaints regarding third parties every month would be onerous and unnecessary, and officer would have the same meaning as the definition of that term in California Financial Code section 190. Complaint tracking and review (e.g., reviewing trends, identifying policy changes and training, and reviewing third-party complaints) is not solely handled by one person, but rather by several designated teams within our servicing operations and compliance groups. It would be burdensome for one person (an "officer" as defined by Section 190) to handle all the responsibilities associated with Parts (c)(3). Additionally, it is unclear what level is intended with the reference to "officer." For example, is a supervisor sufficient? What about a manager, national manager, or higher? Accordingly, we recommend changing the reference to officer in Part (c)(3) to instead say "officer or officer's designated team(s)" and recommend revising or replacing the definition of an officer, so that it is not limited to someone that has a formal officer title (e.g., VP) to accommodate the different ways companies are structured and designate the nomenclature of supervisory titles.

Part (e)

We reiterate our comments above raising concerns with the resolution timeline required by this section and request at least 30 business days for resolution of all complaints, with a possible 30-business day extension. Further, a written response resolving a complaint may not make sense in all cases, and communication by phone may be appropriate and more immediate than a letter delivered through the mail. For this reason, we request flexibility to provide the final response either in writing or over the phone, at the covered entity's discretion.

Additionally, while we understand the intent of section (e)(3) to prevent consumers from facing adverse actions in retribution for complaints, we believe additional clarification is needed. Some complaints are attempts to commit fraud against the covered person or a complainant may

express an intent to commit violence against a third party or to themselves. Some complaints also indicate threats of violence against the covered person's representatives, or the complainant is engaging in abusive conduct against the covered person's representative (i.e. using racist, sexist, homophobic language directed at an employee). This provision may interfere with a covered person's ability to protect its employees or third parties. In such instances, the covered person should be allowed to respond appropriately, even if the action might be deemed adverse. Additionally, the customer may be requesting cancellation of the contract, or the covered person may decide to forgive/waive a debt; such remedies should not be considered adverse cancellation in violation of this provision.

For the requirements of section (f), we have concerns with several of the provisions:

- (f)(5) the name of the representative who documented the complaint would not be available for a written or electronically submitted complaint.
- (f)(11) for the name of the person who decided not to investigate, we reiterate our concerns outlined regarding part (c) above.
- (f)(14) we recommend changing "or an electronic link to" to "or reference to where copies can be found for" to minimize locations of where personal information is stored without building functionality to electronically link to such locations and update such links if needed.

Part (h)

We have significant concerns about the report required in part (h). First, DFPI must explain the statutory authority for requiring periodic reporting. DFPI cites Cal. Fin. Code § 90008 as the basis for this rulemaking. That section requires "timely responses" to consumers and to the Department, but makes no reference to periodic reporting to the Department, let alone making the report available to the public. It is not clear why DFPI has exceeded its statutory authority. In addition to explaining its authority, DFPI should explain why such reporting and public release thereof are necessary for public protection.

We recommend DFPI require instead a quarterly certification, rather than a full report, indicating that covered persons have engaged in the required internal review as specified by the DFPI which identified opportunities for correction where applicable, and engaged in remedial training, as necessary.

As stated in the Department's Notice of Proposed Rulemaking:

The Department must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

A certification requirement rather than requiring a full report is a reasonable alternative that would carry out the purpose of the DFPI's interest in ensuring internal monitoring and

remediation efforts are being undertaken without requiring the full production and invasive requirement of a detailed report. The proposed extensive quarterly reporting will be costly and unduly burdensome.

The demand to make an entity's detailed internal proprietary information, processes, and remedial efforts undertaken to address operational issues, and produce a detailed quarterly report that is not protected from third-party production, is objectively unreasonable. Many pieces of information required to be disclosed could include confidential information, trade secrets, inside information under securities laws, or even attorney-client privileged information, so this section would require public release of sensitive company information. While the Department in Section 1075 recognizes the need to protect certain sensitive information, the public reporting provisions of part (h) abandon this principle and leave covered entities at significant risk. Public release of this information could expose covered entities to abusive frivolous litigation, potential fraud targeted at the complaint process and competitive disadvantage from competitors. If the Department still moves forward with a reporting requirement, we recommend instead an annual or semi-annual reporting requirement and a provision stating that any report available to the public exclude sensitive information. Additionally, many of the categories outlined in (h)(13) are vague or duplicative. We request that the types of complaint categories be structured consistent with the CFPB's complaint reporting processes.

Section 1073: Inquiry Processes and Procedures

We reiterate our concerns outlined above regarding the broad definition of "inquiry" and recommend striking the entire section due to burdens imposed by the requirements with little consumer benefit. Extensive tracking and disclosure requirements for mundane inquiries that are immaterial to the consumer's understanding of a financial product or to a covered entity's operations do not serve consumers and only further tie up resources that covered entities should be devoting to responding to and resolving consumer complaints. Given the broad definition of a complaint, issues of potential concern will be logged and tracked as complaints, with trends being identified and addressed. Additionally, we are concerned that the entire inquiry process may be too cumbersome for customers. Some customers may just want a quick clarification to their question without having to provide all the information required in the rules. To the extent that the provisions of Section 1073 align with those of Section 1072, we also emphasize our concerns outlined above for the parallel sections.

Relation to Federal Laws

DFPI should clarify that federal law controls when inquiries and complaints fall under applicable federal laws that establish response times and procedures. For instance, there is no need for DFPI to create new requirements with respect to inquiries or complaints that would be classified as direct credit disputes to a data furnisher under Section 623 of the Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681s-2). And, indeed, states are expressly preempted from doing so by FCRA § 625(b)(1)(F) (15 U.S.C. § 1681t(b)(1)(F)).

Effective Date

The proposed rules would require numerous updates to existing operational systems, including changes to contracts with third-party service providers, website changes to accept and promote complaint submissions, and training staff to accept and investigate complaints in compliance with the rules. Therefore, we request that the final rules include a delayed effective date, at least 12 months after adoption of the final rule, which will allow affected financial institutions adequate time to implement the required changes.

Thank you in advance for your consideration of our comments. If you have any questions or would like to discuss this further, please do not hesitate to contact us.

Sincerely,

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